Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-6677

HORACE BUTLER,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY. 1

1. There is no principled basis to distinguish this case from Edwards v. Arizona or Arizona v. Roberson 1

2. Arizona v. Roberson is not new law 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

	Page
Arizona v. Roberson, ___ U.S. ___, 108 S.Ct. 2903 (1988).	passim
Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987)	3
Brewer v. Williams, 430 U.S. 387 (1977)	3
Butler v. Aiken, 846 F.2d 255 (4th Cir.), modified on panel rehearing (Dec. 12, 1988)	2
Connecticut v. Barrett, 479 U.S. 523 (1987)	3, 4
Edwards v. Arizona, 451 U.S. 477 (1981)	passim
Griffith v. Kentucky, 479 U.S. 314 (1987)	6
Maine v. Moulton, 474 U.S. 159 (1985)	3
Michigan v. Jackson, 475 U.S. 625 (1986).	3, 4
Michigan v. Mosely, 423 U.S. 96 (1976).	4
Shea v. Louisiana, 470 U.S. 51 (1985)	6
Smith v. Illinois, 469 U.S. 91 (1984)	4
Teague v. Lane, ___ U.S. ___, 109 S.Ct. 1060 (1989) . . .	5, 6
Yates v. Aiken, 484 U.S. ___, 108 S.Ct. 534 (1988). . . .	6

IN THE

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HORACE BUTLER,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA T. TRAVIS MEDLOCK,

Respondent.

PETITIONER'S REPLY BRIEF

ARGUMENT IN REPLY

Respondent asserts in its brief in opposition to the petition for writ of certiorari both that the facts of petitioner's case are distinguishable from those in Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2903 (1988), and that Arizona v. Roberson is new law and should not be applied retroactively to petitioner's case. Because respondent's assertions are contradicted both by the facts of this case and by the established precedent of this Court, certiorari should be granted and the decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

1. There is no principled basis to distinguish this case from Edwards v. Arizona or Arizona v. Roberson.

Respondent attempts in its brief in opposition to distinguish petitioner's case from Roberson, supra, and Edwards v. Arizona, 451 U.S. 477 (1981), on two basic grounds. First, respondent asserts that because petitioner saw his attorney after he invoked the right to counsel, the police were free to resume interrogation. Brief in Opposition at 11. Second, respondent asserts that because petitioner did not request counsel in the context of a police interrogation, he did not invoke his Fifth Amendment right to counsel. Brief in Opposition at 10. Before discussing respondent's arguments in more detail, it is important

to note that the panel of the United States Court of Appeals for the Fourth Circuit has already rejected respondent's contentions concluding, "[a]s an initial matter, we reject respondent's assertions to distinguish Roberson factually." Butler v. Aiken, No. 87-4004 (4th Cir. Dec. 12, 1988) Order at 2, modifying on panel rehearing Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988).[1] The Court of Appeals decision in this regard is compelled by an application of this Court's prior decisions to the facts of petitioner's case.

Respondent's second argument is wholly frivolous and will be disposed of first. The panel on rehearing found that:

> the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson.

Order at 2-3.[2] Nevertheless, respondent asserts that because petitioner did not invoke the right to counsel during a custodial interrogation, he did not invoke his Fifth Amendment right to counsel. This contention is rebutted by an unbroken line of this Court's prior decisions which hold that courts should give a

[1]The panel of the Court of Appeals, with five judges dissenting from the denial of rehearing en banc, held that although it would be compelled to reverse petitioner's conviction and sentence of death in light of Roberson if petitioner's case were before it on direct review, relief should be denied because Roberson did not apply retroactively to petitioner's case. Order at 3-4.

[2]The facts surrounding this claim are as follows. Petitioner was arrested on August 30, 1980, on a charge--later dismissed--unrelated to this offense. The officers brought petitioner to the county jail, where he remained until his bond hearing late the following evening. Prior to the hearing, petitioner invoked his right to counsel by retaining a local attorney, W. McAlister Hill. Hill appeared with petitioner at the bond hearing on August 31. Petitioner was unable to post bond and was returned to the Charleston County Jail. Hill later testified that he warned the police against any further questioning of his client. After attorney Hill left the jail, at approximately 12:15 a.m. on September 1, the same four officers who had arrested petitioner on the assault charge brought him to the Charleston County Police Headquarters where they initiated an interrogation concerning the murder of Miss Lane. After informing petitioner that they were charging him with the Lane murder, the police officers questioned him for some five hours, during which time they obtained two separate Miranda waiver forms and two different statements regarding his participation in the crime.

broad rather than a narrow interpretation to a defendant's request for counsel. See, e.g., Michigan v. Jackson, 475 U.S. 625, 633 (1986). As this Court stated in Jackson, "[w]hen an accused requests an attorney. . . he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel." 475 U.S. at 633 n. 7; see also Connecticut v. Barrett, 479 U.S. 523 (1987); Maine v. Moulton, 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387, 404 (1977) (defendant's actions in securing counsel revealed that he desired the presence of counsel before any police interrogation took place); Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987) (Defendant's request for counsel at arraignment is invocation of the right to have counsel present at any subsequent police initiated interrogation). Respondent, in essence, attempts to penalize petitioner for invoking his right to counsel at the earliest possible opportunity, i.e., immediately after his arrest on the unrelated assault charge. Thus according to respondent's perverse logic, the only way in which petitioner could have successfully invoked his Fifth Amendment right to counsel would have been--despite the fact that he had previously retained counsel to represent him--to submit to a police interrogation and then reinvoke the right to counsel during the custodial questioning. This, of course, makes no sense. Petitioner's actions in securing attorney Hill to represent him on the assault charge--and his appearance with Hill at the bond hearing prior to the police initiated interrogation--speak louder than words, and clearly demonstrate petitioner's assertion of his right to counsel.[3]

Second, respondent asserts that because Hill saw petitioner between the invocation of the right to counsel and the interrogation, that the mandate of Edwards and Roberson was

[3]It is important to remember when reviewing this claim that petitioner has a mental age between seven and eleven, and an I.Q. in the high sixties or low seventies. When he completed his education at the age of sixteen, he had only completed the fourth grade.

satisfied. Brief in Opposition at 11-12. Apparently respondent believes that once an accused invokes the right to counsel, the police are free to initiate interrogation after the accused has spoken with his attorney. Again this contention is soundly rejected by the clear language and logic of this Court's prior rulings. In Smith v. Illinois, 469 U.S. 91, 95 (1984) this Court held that "if the accused invokes the right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." See also Connecticut v. Barrett, 479 U.S. at 527-28 (once defendant invokes right to counsel then police are forbidden from engaging in further interrogation that is not initiated by the defendant; the purpose of this rule is to "erect an auxiliary barrier against police initiated interrogation"); Michigan v. Jackson, 479 U.S. at 633 (defendant's request for counsel at arraignment carries over to any subsequent police initiated interrogation).

Respondent's interpretation of Edwards and Roberson would undermine the "bright line" quality of the Edwards rule by permitting the police to reinitiate interrogation of a defendant following every meeting with his lawyer. A defendant would have to consistently submit to police interrogation and reassert his right to counsel after every attorney-client consultation. This reasoning is totally at odds with the rationale underlying this basic constitutional principle, which is that when an accused invokes the right to counsel he is expressing his view that he is not competent to deal with the authorities without legal advice. Michigan v. Mosely, 423 U.S. 96, 110 n.2 (1976); see also Michigan v. Jackson, 476 U.S. at 633-34, n.7. As this Court stated in Mosely:

> The reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney.

Mosely, 423 U.S. at 110 (emphasis added). Thus there can be no serious dispute that once an accused invokes the right to counsel, the police cannot initiate interrogation of the defendant himself. The police may contact his attorney and request permission to talk with the accused, or they may talk with the accused if he initiates the interrogation. However, they may not force an accused who has previously invoked the right to counsel to undergo questioning after every meeting with his attorney. Respondent's assertions to the contrary are erroneous.

2. Arizona v. Roberson is not new law.

Respondent, relying on this Court's recent decision in Teague v. Lane, ___U.S.___, 109 S.Ct. 1060 (1989), asserts that Roberson should not be applied retroactively to petitioner's case because Roberson is new law. Brief in Opposition at 12-16.[4] Again this contention is totally without merit. In Teague, a majority of this Court concluded that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." 109 S.Ct. at 1070. Even a cursory review of Arizona v. Roberson reveals that it is not new law, but rather a straightforward application of this Court's prior decision in Edwards v. Arizona, supra. For example, in Roberson the majority framed the question presented as whether the Court should "craft an exception to [the rule of Edwards v. Arizona] for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 108 S.Ct. at 2096. The majority ultimately concluded that "[p]etitioner's attempts at distinguishing the factual setting here from that in Edwards are . . . unavailing," and affirmed the judgment of the Arizona Court

[4]In Teague, the plurality held that, in general, new rules of law should not be applied retroactively to cases in federal habeas corpus, and that retroactivity should be treated as a threshold matter in collateral proceedings.

of Appeals. 108 S.Ct. at 2100-01.[5]

Under these circumstances, the question before this Court is whether the bright-line rule of Edwards v. Arizona applies retroactively to petitioner's case. Edwards was decided while petitioner's case was pending on direct appeal to the South Carolina Supreme Court. Thus the retroactivity question presented in this case has already been resolved. In Shea v. Louisiana, 470 U.S. 51 (1985), this Court specifically held that Edwards applied to cases pending on direct review at the time it was decided. 470 U.S. at 59; see also Griffith v. Kentucky, 479 U.S. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases sate or federal, pending on direct review or not yet final"); Yates v. Aiken, ___U.S.___, 108 S.Ct. 534, 537 (1988) (acknowledging that new rules apply retroactively to cases pending on direct review at time rule was established). This principle was not disturbed by Teague. The Teague plurality and concurring opinions agreed that an individual is entitled to the benefit of any decision rendered--whether the decision creates a new rule of law or not--before his or her conviction becomes final on direct review. 109 S.Ct. at 1075. Thus, as Edwards was decided on May 18, 1981, and the South Carolina Supreme Court did not issue its opinion in petitioner's case until February 22, 1982, Shea permits no other conclusion except that the "bright-line" rule of Edwards was applicable in petitioner's case. The Court of Appeals was incorrect in ruling otherwise, and its decision cannot be permitted to stand. See Shea, supra.

[5]Despite respondent's contention to the contrary, the Fourth Circuit panel on rehearing also did not believe that Roberson was new law as it found that "[t]he subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson." The panel also discussed the "Edwards-Roberson limitations on police interrogation". Order at 8. The panel on rehearing determined that Edwards and Roberson did not apply to petitioner's case because neither case had been decided at the time of petitioner's arrest and trial. Order at 3. This conclusion is at odds with this Court's decisions in Griffith v. Kentucky, 479 U.S.314 (1987) and Teague v. Lane, supra. The five judges dissenting from the denial of rehearing en banc also stated that this Court's holding in Roberson was nothing more than an application of Edwards. Order at 8-9.

CONCLUSION

Because the decision of the Court of Appeals conflicts both with the decisions of this Court and the decisions of other federal courts of appeal, certiorari should be granted in this case and the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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April 11, 1989